Supreme Court, U. S.
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IN THE

Supreme Court of the United States

77-1443

EDGAR H. MELIA,

Petitioner.

v.

DAVID MATHEWS, Secretary of Health, Education & Welfare

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FIFTH CIRCUIT

TUCK R. CHAPIN, INC.
815 Main Plaza Building
San Antonio, Texas 78205

Counsel for Petitioner

IN THE

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EDGAR H. MELIA,

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San Antonio, Texas 78205

Counsel for Petitioner

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IN THE

Supreme Court of the United States

EDGAR H. MELIA,
Petitioner.

v.

DAVID MATHEWS, Secretary of Health, Education & Welfare

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FIFTH CIRCUIT

The Petitioner, EDGAR MELIA, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the Fifth Circuit for the United States rendered and mandated in these proceedings on January 12, 1978.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals, unreported, appears at Appendix A, *infra*, p. 8. The opinion of

the District Court for the Western District of Texas, San Antonio Division, appears at Appendix A, p. 9. The Court of Appeals affirmed the decision of the District Court.

JURISDICTION

The Judgment of the Court of Appeals of the Fifth Circuit was handed down on December 21, 1977, mandated on January 12, 1978, and filed with the U.S. Clerk of the Western District of Texas, San Antonio Division on the 16th day of January, 1978. See Appendix A, p. 8, *infra*. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1244(3).

QUESTIONS PRESENTED

Whether the Fifth Circuit Court of Appeals erroneously applied the substantial evidence doctrine, relative only to questions of fact, to the petitioner's question of law concerning the proper legal standard applicable to Petitioner's claim against the Social Security Administration.

STATUTES AND REGULATIONS INVOLVED

Title 20, Code of Federal Regulations, Section 404.1506
(a) (1) Subpart P, Appendix, Sections 1.08 and 1.09
Title 20, Code of Federal Regulations Section 404.1506
(a) (1) and (2)
Regulation (4), Section 404.1524(c)
Title 2, Social Security Act
Social Security Act, Section 216(i) and 223
Social Security Act, Section 223(d) (1) (2)A and (3)
Social Security Act, Section 202 E or F
42 USC, Section 405(g)
A definition of the substantial evidence rule:

Evidence furnishing a substantial basis of fact from which the fact in issue can reasonably be inferred. National Labor Relations Board v. A.S. Abell Co., 97 F.2d 951, C.C.A. (1938).

STATEMENT OF FACTS

During the Korean Conflict, Appellant, a member of the United States Armed Services, was exposed to extremely cold temperatures and suffered severe frostbite. As a result thereof, it was necessary that large portions of Appellant's feet be amputated, and that was done surgically. Thereafter, Appellant returned to civilian life and sought employment. Appellant discovered, however, that he was unable to retain gainful employment, and thereafter, sought disability benefits under the Social Security Act. All other qualifications and requirements under said Act having been met, Appellant sought to prove his disability to the Social Security Administration and among other grounds offered medical evidence of the anatomical deformity of his feet in order to gain disability benefits. Such benefits were denied to Appellant and all administrative remedies were pursued by him and exhausted without such benefits being granted. When all administrative avenues had been depleted, Appellant filed his complaint in the United States District Court for the Western District of Texas as hereinabove stated. After considering the Motion for Summary Judgment and the responses, the trial court granted Defendant's Motion for Summary Judgment hence the Appeal.

REASONS FOR ALLOWANCE OF THE WRIT

The Secretary of Health, Education and Welfare has set out in regulations at 20 CFR 404.1506, 33 Federal Register 11749, August 20, 1968, and in the Appendix thereto, an elaboration of the test for permanent and total disability contained in the Social Security Act. The applicable section of the

Social Security Act in Section 223(d)(1)(2)A and (3) and this provides in part:

> (d)(1) The term disability means:
>
> (A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

Subpart P of 20 Code of Federal Regulations Section 404.1506 provides in part:

> The Listing of Impairments describes, for each of the major body systems, impairments which—
> (1) are of a level of severity deemed sufficient to preclude an individual from engaging in any gainful activity; and
> (2) are expected to result in death or to last for a continuous period of not less than 12 months.

The Appendix of Subpart P of 20 Code of Federal Regulations reads in part:

> 1.09 Amputation of; or anatomical deformity of (i.e. loss of major function due to degenerative changes associated with vascular or neurological deficits, traumatic loss of muscle mass or tendons . . .)
>
> . . . .
>
> B. Both Feet;

Reading the above statute in the definitive light of the regulations promulgated by the Secretary, one is confronted with the clear, unambiguous and definitive statement that, where a claimant has the loss of major function due to traumatic loss of muscle mass or tendons to both feet, his impairment is of such a severity as to preclude him from engaging in any gainful activity; and this condition will last for a continuous period of not less than twelve months. This is the proper standard by which petitioner was entitled to have his impairment judged. On the other hand, the Administrative Law Judge, who heard Petitioner's claim for benefits, applied

a more rigid standard in the case of Petitioner. The standard applied was whether the Petitioner was able to engage in substantial gainful employment as it appears without elucidation in the Social Security Act, Section 223(d)(1)(2)A and (3). The application of this more rigid standard flies in the face of the lawful authority of the Secretary to prescribe criteria by regulation which are of a severity sufficient enough to preclude a person from engaging in substantial gainful activity.

This is clearly an incorrect application of the legal standard by which to judge a claimant with an anatomical deformity of both feet, the category into which the Petitioner fits.

The United States District Court for the Western District of Texas, in its judgment of the case, passed over this error by applying the substantial evidence doctrine which applies to issues of fact in administrative proceedings. *P.R. Mallory & Co. v. National Labor Relations Board*, 411 F.2d 948, C.A. 7(1969).

On appeal to the Fifth Circuit the Petitioner raised a question of law: namely, whether the administrative Judge, who ruled on the Petitioner's claim, applied the correct legal standard as set out in the above regulations. In response to this question of law, the Fifth Circuit affirmed the order granting the United States government's motion for summary judgment entered by the United States District Court for the Western District of Texas, San Antonio Division. This order stated that, "the decision of the Secretary is supported by substantial evidence." This statement leads the Petitioner to believe that his question of law was answered by a doctrine applicable only to questions of fact, i.e., the substantial evidence doctrine. This puts the Fifth Circuit Court of Appeals squarely against the decisions of other Courts of Appeals which have decided that the substantial evidence rule is applicable to questions of fact. *P.R. Mallory & Co. v. National Labor Relations Board*, 411 F.2d 948, C.A. 7(1969).

This is an extremely important issue to be decided by the

Supreme Court of the United States because, otherwise District Courts are allowed to summarily apply a doctrine relative only to questions of fact to question of law, a practice which borders ominously upon a denial of due process and is clearly against the existing case law on the substantial evidence doctrine.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit of the United States.

Respectfully submitted,
TUCK R. CHAPIN, INC.

By Tuck R. Chapin

Tuck R. Chapin
815 Main Plaza Building
San Antonio, Texas 78205
Counsel for Petitioner

APPENDIX A

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH DISTRICT

No. 77-2424
Summary Calendar*

EDGAR H. MELIA,

Plaintiff-Appellant,

versus

JOSEPH CALIFANO, JR., Secretary of Health, Education and Welfare,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Texas

(December 21, 1977)

Before THORNBERRY, RONEY and HILL, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

Costs are taxed against plaintiff-appellant.

ISSUED AS MANDATE: JAN. 12, 1978

A true copy
Test: EDWARD W. WADSWORTH
Clerk, U.S. Court of Appeals, Fifth Circuit

By_____
Deputy
January 12, 1978

*Rule 18, 5th Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5th Cir. 1970, 431 F.2d 409, Part I.

1/See N.L.R.B. v. Amalgamated Clothing Workers of America, 5th Cir. 1970, 430 F.2d 966.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

EDGAR H. MELIA	)	
	)	
VS.	)	SA-75-CA-259
	)	
DAVID MATHEWS Secretary of HEW	)	

ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

On the 29th day of April, 1977, came on to be heard Defendant's Motion for Summary Judgment. After a review of the motion, its supporting brief, and the entire administrative record in the case, the Court concludes that the decision of the Secretary is supported by substantial evidence. Since there is no question of material fact and the Defendant is entitled to judgment as a matter of law, the Court grants Defendant's motion for summary judgment. Since Plaintiff is not entitled to judgment as a matter of law, the Court denies Plaintiff's motion for summary judgment.

SO ORDERED this 11th day of May, 1977.

UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

EDGAR H. MELIA, Plaintiff	)	
v.	)	CIVIL ACTION NO. SA-75-CA-259
DAVID MATHEWS, Secretary of Health, Education and Welfare Defendant	)	

MOTION FOR SUMMARY JUDGMENT

Now comes David Mathews, Secretary of Health, Education and Welfare, Defendant herein, by and through the United States Attorney for the Western District of Texas, and Archie Carl Pierce, Assistant United States Attorney for the Western District of Texas, and pursuant to Rule 56 of the Federal Rules of Civil Procedure, moves this Honorable Court to enter summary judgment in favor of the Defendant, on the grounds that there is no genuine issue of material fact in this cause of action, and the Defendant is entitled to judgment as a matter of law.

This motion is supported by the attached Memorandum Brief and the administrative record filed herein.

Respectfully submitted,
JOHN E. CLARK
UNITED STATES ATTORNEY

By:

ARCHIE CARL PIERCE
Assistant U.S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

EDGAR H. MELIA, Plaintiff	)	
vs.	)	CIVIL ACTION NO: SA-75-CA-259
DAVID MATHEWS, Secretary of Health, Education and Welfare Defendant	)	

MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Statement of the Case

Plaintiff brought this action pursuant to Section 205(g) of the Social Security Act, as amended (42 U.S.C. Section 405(g)), to obtain judicial review of a "final decision" of the Secretary of Health, Education, and Welfare, denying his claim for disability insurance benefits.

ADMINISTRATIVE PROCEEDINGS

Plaintiff filed an application[1/] for a period of disability and for disability insurance benefits on July 5, 1973 (Tr. 79-)82), alleging that he became unable to work in 1962, at age 32. The application was denied initially (Tr. 85-86) and on reconsideration (Tr. 89) by the Bureau of Disability Insurance of the Social Security Administration, after the Texas State Agency, upon evaluation of the evidence by a physician and a

1/Plaintiff previously filed an application for a period of disability and for disability insurance benefits on July 11, 1962 (Tr. 33-36) which was denied initially (Tr. 38-40) and on reconsideration (Tr. 41-45), and lastly by a hearing examiner (Tr. 72-78). That became the final decision of the Secretary on this previous application when plaintiff did not timely pursue the rights of further appeal available to him under this Social Security Act and the Regulations issued pursuant thereto. Plaintiff's application of July 11, 1962, is therefore, not before this Court for review. The matter now under consideration deals with plaintiff's claim for benefits under his application filed on July 5, 1973 (Tr. 79-82).

disability examiner, had found that plaintiff was not under a disability (Tr. 83, 88). The administrative law judge, before whom plaintiff appeared, considered the case *de novo*, and on May 6, 1975, found that plaintiff was not under a disability starting on or before June 30, 1967, when he last had the necessary insured status (Tr. 5-9). The administrative law judge's decision became the final decision of the Secretary of Health, Education, and Welfare, when the Appeals Council approved the decision on August 12, 1975 (Tr. 3).

APPLICABLE PROVISIONS OF THE SOCIAL SECURITY ACT

(See Attached Appendix "A")

ISSUE

The only issue before the Court is whether the final decision of the Secretary is supported by substantial evidence.

STATEMENT OF FACTS

Plaintiff last met the statutory earnings requirement on June 30, 1967 (Tr. 8, 90). Therefore, he must establish that he was under a disability (within the meaning of the Act), prior to the expiration of his insured status on June 30, 1967.

He has a high school (commercial course) education, plus a course in drafting for 1 year and had worked in various jobs in a clerical capacity and as a bookkeeper, clerk-typist, machine wrapper and messenger (Tr. 22-23, 26, 47-48). In his application filed on July 5, 1973, he alleged inability to work since 1962, at age 32, because of ulcers, anxiety reaction, frostbite on both feet and no toes (Tr. 79-82). The Secretary found that plaintiff had frostbite and loss of his toes in 1950, remedial surgery for duodenal ulcers in 1959, and an anxiety reaction that manifested itself in a severe state in 1971 long after he last met the insured status. He was unable to perform heavy manual labor or work requiring long standing or extensive walking, but had residual capacity to perform his customary work as a bookkeeper, clerk-typist, or draftsman, and was not under a disability (within the meaning of the Act), prior to the expiration of his insured status on June 30, 1967 (Tr. 7-9).

Clinical records of the United States Naval Hospital, Bethesda, indicate that plaintiff was admitted on December 2, 1950, with a diagnosis of compound fractures, comminuted of the right tibia and fibula, sustained when he was hit by a small missile in the lower right leg in military action (Tr. 49-51). On February 25, 1951, the toes of the left foot were amputated. On March 7, 1951, an open amputation was performed through the distal third of the right forefoot, and skin grafts were applied to the surgical area of the left foot. On March 15, 1951, skin grafts were also applied to the right foot. He was discharged from service in September 1951.

Plaintiff was examined by the Veterans Administration, Baltimore, in November 1951, in connection with his claim for compensation (Tr. 52-55). He had a previous history of a fracture of the right leg by a bullet, and amputation of the toes of both feet due to frostbite. Examination revealed that the right leg appeared to be well healed, was ½ inch shorter than the left, had good general alignment and no excessive bowing. The toes and some of the metatarsal bones were absent from the right foot. The left foot revealed amputated toes at the metatarsal heads. There was good motion of the left ankle joint. The right ankle joint indicated the dorsiflexion was limited to approximately the normal standing position.

Records of the Veterans Administration, Philadelphia, reveal that plaintiff was admitted from August 20 to September 11, 1958, for complaint of left upper quadrant pain (Tr. 60-61). He had a past history of a duodenal ulcer and did well on a bland diet. During hospitalization he was treated with a sippy diet and medication, improved, became free of symptoms

(asymptomatic) and regained his strength and optimism. Diagnosis was active duodenal ulcer with bleeding.

On August 31, 1959, he was admitted to the Veterans Administration Hospital, Philadelphia, with complaint of abdominal pain relieved by alka-seltzer, after having been involved in heavy lifting and not following his diet (Tr. 56, 59, 115-118). Examination revealed a deformed duodenal cap and several active ulcers. Diagnosis was duodenal ulcer disease with upper gastrointestinal bleeding. Remedial surgery (hemigastrectomy and vagotomy) was performed and by September 19, 1959, the surgery was well healed and he was discharged on October 16, 1959.

Dr. David Gelfand, internist, performed an examination and evaluation of plaintiff in September 1962 (Tr. 65, 71). He concluded that plaintiff had significant impairment of the feet, *but could perform substantial gainful activity with the following restrictions: no running, climbing one flight at a time, walking one block at a time, standing 10 percent of the time, avoiding high and low temperatures, humid and wet places, mechanical and electrical hazards, moving objects, cramped quarters and high places.* The doctor thought that further treatment should result in significant functional improvement.

Dr. Stephan A. Christides, orthopedic surgeon, performed an examination and evaluation of plaintiff in September 1962 (Tr. 66-70). The doctor concluded that plaintiff had trouble with the right foot because the skin graft to the plantar surface of that foot did not give adequate padding for weight bearing every time he walked more than a few blocks. The doctor advised plaintiff to have a skin flap from the opposite leg to the plantar surface of the right foot so he would have good padding and be able to walk without discomfort. Plaintiff believed he could continue with his training in electronics

so he could get a sitting job and start working by the end of the year 1962.

Plaintiff was admitted to the Veterans Administration Hospital, Philadelphia, from January 22 to March 22, 1968, for dental services and anxiety reaction (Tr. 111-114). His anxiety was treated with Librium with improvement and he was discharged with no medication.

A psychiatric examination of plaintiff by Veterans Administration, Washington, D.C., in November 1971 for rating purposes, concluded that plaintiff was mentally competent and oriented for time, place and person, and was also competent to handle financial funds (Tr. 120). He was deemed to have an exacerbation of his anxiety (emotional) reaction.

Plaintiff was admitted to the Veterans Administration Hospital, Washington, D.C., from January 20, to February 28, 1972, for evaluation and observation relative to his anxiety over his 14 year old son and difficulties in dealing with his wife (Tr. 119). Examination revealed that plaintiff was alert, oriented and cooperative, and manifested slight depression. There were no psychotic signs. Physical examination, except for past surgery, was not remarkable. He was treated on Elavil and Librium with a quick improvement in his depressive symptoms and a more active display of his passive agressive character in his dealings with his wife and son, and was given some time to work through his relationships with some resolution. With remission of symptoms he was discharged, medically deemed competent.

After his alleged date of inability to work, plaintiff continued to be ambulatory and traveled about outside without assistance (Tr. 79), drove his car, ran errands to the store, watched the children while his wife was out working (Tr. 27), worked around the house, took care of his own personal needs, cooked and went fishing (Tr. 48). He testified that he did some bookkeeping with an automobile sales company for about

3 months in 1968 and quit of his own accord (Tr. 22), that he did telephone land sales work for about 3 months in 1974 but was laid off with five or six other employees when the economy got bad (Tr. 22-23). He also testified that he can do any kind of clerical work, also bookkeeping, and has applied to Civil Service for light fulltime work (Tr. 24-25).

ARGUMENT

I. The Secretary's Decision That Plaintiff Is Not Entitled To Disability Insurance Benefits Is Supported By Substantial Evidence And Must Be Affirmed.

The limited role of the Court on judicial review under 42 U.S.C.A. 405(g) is to determine whether there is substantial evidence in the entire record to support the fact findings or decision of the Secretary, as the trier of facts, and not to reweigh the evidence, or try the issues de novo, or substitute the judgment of the Court for that of the Secretary. *Goodman v. Richardson*, 448 F.2d 388 (5 Cir., 1971). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales*, 402 U.S. 389, 91 S.Ct. 1420, 28 L.Ed.2d 842, 846 (1971); *Hemphill v. Weinberger*, 483 F.2d 1137 (5 Cir., 1973).

Substantial evidence is more than a scintilla, less than a prepondenance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It must do more than create a suspicion of the existence of the fact to be established, but "no substantial evidence" will be found only where there is a "conspicuous absence of credible choices" or "no contrary medical evidence." *Hemphill v. Weinberger*, supra; *Payne v. Weinberger*, 480 F.2d 1006 (5 Cir., 1973).

The concept of disability is defined in the Social Security Act, 42 U.S.C., sections 416(i)(1) and 423(d)(l)(a), in relevant part as "inability to engage in any substantial gainful

activity by reason of any medically determinable physical or mental impairment which ... has lasted ... for a continuous period of not less than 12 months."

Section 423(d)(3) further defines "physical or mental impairment" as meaning "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."

The Secretary found that plaintiff had frostbite and loss of his toes in 1950, remedial surgery for duodenal ulcers in 1959, and an anxiety reaction that manifested itself in a severe state in 1971 long after he last met the insured status. He was unable to perform heavy manual labor or work requiring long standing or extensive walking, but had residual capacity to perform his customary work as a bookkeeper, clerk-typist, or draftsman, and was not under a disability (within the meaning of the Act), prior to the expiration of his insured status on June 30, 1967.

The medical evidence of record indicates that plaintiff did suffer frostbite and surgical loss of the toes of both feet in 1950. He had remedial surgery by way of a hemigastrectomy and vagotory in 1959 for duodenal ulcers. The anxiety reaction apparently manifested itself in a severe degree in 1971, a date long after he last met the statutory insured status. Plaintiff was able to stand and walk short distances, and his ulcer condition was reasonably well controlled with a regulated diet after the remedial surgery. He traveled about aside without assistance, drove his car, went shopping to the store, watched the children, cooked, took care of his own personal needs and went fishing. He testified that he can do any kind of clerical work, also bookkeeping and has applied for light full time work. The evidence indicated that on or before June 30, 1967, plaintiff had residual capacity to perform light and sedentary work in which he was experienced such as a clerk-typist or

bookkeeper, or draftsman in which he had at least a one year training course.

The Courts have held in numerous cases that if an insured individual suffers from an impairment which precludes heavy work, or work which requires certain kinds of physical exertion but it is shown that he can engage in other light forms of substantial gainful activity, a "disability" within the meaning of the Act has not been established. *Hicks v. Flemming*, 302 F.2d 470 (5 Cir., 1962), cert. denied 371 U.S. 868 (1962); *Breaux v. Finch*, 421 F.2d 687 (5 Cir., 1970; *McKay v. Richardson*, 363 F. Supp., 379 (N.D. Texas, 1973), aff'd 491 F.2d 1271 (5 Cir., 1974).

The mere presence of a disease or an impairment is not disabling *per se*. The plaintiff must show that *he is so functionally impaired that he is precluded from engaging in substantial gainful activity. Blalock v. Richardson*, 483 F.2d 773 (4 Cir., 1972); *Fisher v. Weinberger*, CCH UIR Vol. 1, Fed. para. 17,869 (E.D. Tenn., January 3, 1974), aff'd 506 F.2d 1400 (6 Cir., 1974).

Plaintiff drew service connected benefits from the Veterans Administration. A decision by any other governmental or nongovernmental agency that an individual is or is not under a disability within the meaning of another statute or contract is not determinative of the question of whether such individual is under a disability within the meaning of the Social Security Act, and is not binding on the Secretary (20 C.F.R. 404.1525). *Entrekin v. Weinberger*, 477 F.2d 561 (5 Cir., 1973); *Skeels v. Richardson*, 453 F.2d 882 (5 Cir., 1972), cert. denied 409 U.S. 857 (1972).

Any impairment which first began or reached the requisite statutory severity after the expiration of plaintiff's insured status is irrelevant and immaterial and cannot be the basis for a claim for disability benefits under the Social Security Act. *Goodman v. Richardson*, 448 F.2d 388 (5 Cir., 1971); *Hart v. Finch*, 440 F.2d 1340 (5 Cir., 1971); *Kirkland v. Weinberger*, 480 F.2d 46 (5 Cir., 1973), cert. denied 414 U.S. 913 (1973).

Accordingly, the evidence fails to establish that plaintiff was under impairment of sufficient severity prior to the expiration of his insured status on June 30, 1967, to have precluded him from engaging in substantial gainful activity for a continuous period of at least 12 months. Therefore, he was not entitled to a period of disability or to disability insurance benefits under Sections 216(i) and 223 of the Social Security Act, as amended.

APPENDIX "A"

APPLICABLE PROVISIONS OF THE SOCIAL SECURITY ACT

Sections 216(i) and 223(d) of the Social Security Act, 42 U.S.C. 416(i) and 423(d), define the term "disability" to provide, in part:

"d) (1) The term 'disability' means—

"(A) inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months;***

* * * * * * * * * * *

"(2) For purposes of paragraph (1)(A)—

"(A) an individual *** shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other

kind of substantial gainful work, which exists in the national economy, regardless of whether such work exists in the immediate area in which he lives, or whether a specific job vacancy exists for him, or whether he would be hired if he applied for work. For purposes of the preceding sentence (with respect to any individual), 'work which exists in the national economy' means work which exists in significant numbers either in the region where such individual lives or in several regions of the country.

"(3) For purposes of this subsection, a 'physical or mental impairment' is an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques."

* * * * * * * * * * *

"(5) An individual shall not be considered to be under a disability unless he furnishes such medical and other evidence of the existence thereof as the Secretary may require."

Section 223(a) and (c) of the Social Security Act, 42 U.S.C. 423(a) and (c), provides in part:

"(a)(1) Every individual who—

"(A) is insured for disability insurance benefits (as determined under subsection (c)(1)),

"(B) has not attained the age of sixty-five,

"(C) has filed application for disability insurance benefits, and

"(D) is under a disability (as defined in subsection (d)) shall be entitled to a disability insurance benefit (i) for each month beginning with the first month after his waiting period (as defined in subsection (c)(2)) in which he becomes so entitled to such insurance benefits, or (ii) for each month beginning with the first month during all of which he is under a disability and in which he becomes so entitled to such insurance benefits, but only if he was entitled to disability insurance benefits which terminated, or had a period of disability (as defined in section 416(i)) which ceased, within the sixty-month period preceding the first month in which he is under such disability, and ending with the month preceding whichever of the following months is the earliest: the month in which he dies, the month in which he attains age 65, or the third month following the month in which his disability ceases.***

* * * * * * * * * * *

"(c) For purposes of this section—

"(1) An individual shall be insured for disability insurance benefits in any month if—

"(B)(i) he had not less than 20 quarters of coverage during the 40-quarter period which ends with the quarter in which such month occurred,***."

CONCLUSION

It is respectfully submitted that the decision of the Secretary is supported by substantial evidence and must be affirmed.

Respectfully submitted,
JOHN E. CLARK
UNITED STATES ATTORNEY

By:
ARCHIE CARL PIERCE
Assistant U.S. Attorney

Of Counsel:
John M. Stokes, Regional Attorney
Thomas E. Tapia, Assistant Regional Attorney
Department of Health, Education & Welfare
Office of the General Counsel
Dallas, Texas 75202

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion for Summary Judgment and memorandum in support thereof have been furnished Plaintiff's attorney by depositing in the U.S. Mail, certified, return receipt requested, postage fee paid, addressed as follows:

Mr. Tuck R. Chapin
Attorney at Law
126 Main Plaza
San Antonio, TX 78205

This the_____day of January, 1977.

ARCHIE CARL PIERCE
Assistant U.S. Attorney
655 E. Durango Blvd., Suite G-13
San Antonio, TX 78206
229-6518

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

EDGAR H. MELIA,
Plaintiff

VS. CIVIL NO. *SA-75-CA-259*

DAVID MATHEWS, Secretary of Health,
Education & Welfare,
Defendant

PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Now comes EDGAR H. MELIA, Plaintiff herein, by and through his attorneys, TUCK R. CHAPIN, INC., and pursuant

to Rule 56 of the *Federal Rules of Civil Procedure*, moves this honorable Court to deny Defendant's Motion for Summary Judgment on the grounds that there is a genuine issue of material fact in this cause of action, and Defendant is not entitled to judgment as a matter of law.

This response is supported by the attached Memorandum Brief and the administrative record filed herein.

Respectfully submitted,

TUCK R. CHAPIN, INC.

By: TUCK R. CHAPIN
126 Main Plaza
San Antonio, Texas 78205

CERTIFICATE

I hereby certify that a true and correct copy of the foregoing PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT was hand delivered to the U. S. ATTORNEY's office, Attention: ARCHIE CARL PIERCE, Attorney for Defendant, 655 East Durango Blvd., San Antonio, Texas, this 4th day of February, 1977.

TUCK R. CHAPIN

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

EDGAR H. MELIA,
Plaintiff

VS. CIVIL NO. *SA-75-CA-259*

DAVID MATHEWS, Secretary of Health,
Education & Welfare,
Defendant

BRIEF IN SUPPORT OF PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

TO THE UNITED STATES DISTRICT COURT:

STATEMENT OF THE CASE

This suit results from Plaintiff's being denied disability benefits under the Social Security Act by the SECRETARY OF HEALTH, EDUCATION, AND WELFARE, and all administrative remedies in that regard were exhausted. The basis for the complaint is that Defendant failed to consider the disability of Plaintiff in the light of Title 20, Code of Federal Regulations, Section 404.1506(a) (l), in conjunction with Subpart P, Appendix, Sections 1.08 and 1.09.

Plaintiff would show that he has had an amputation of portions of both of his feet, which has left both of his feet with anatomical deformity, loss of function, vascular deficits, and loss of muscle mass and tendons that meet the terms of said statutes. Pursuant to the provisions of Title 20, Code of Federal Regulations, Section 404.1506 (a) (1) and (2) and the referenced Appendix, Plaintiff has an impairment which is of a level of severity deemed by statute sufficient to pre-

clude him from engaging in any gainful activity for a continuous period of more than twelve (12) months; and Plaintiff is, accordingly, entitled to Social Security benefits as a matter of law, as will hereinafter be shown.

STATEMENT OF FACTS

During the Korean Conflict, Plaintiff, a member of the United States Armed Services, was exposed to extremely cold temperatures and suffered severe frostbite. As a result thereof, it was necessary that large portions of Plaintiff's feet be amputated, and this was done surgically. Thereafter, Plaintiff returned to civilian life and sought employment. Plaintiff discovered, however, that he was unable to retain gainful employment, and thereafter, sought disability benefits under the Social Security Act. All other qualifications and requirements under said Act having been met, Plaintiff sought to prove his disability to the Social Security Administration and offered medical evidence of the anatomical deformity of his feet in order to gain disability benefits. Such benefits were denied to Plaintiff and all administrative remedies were pursued by him and exhausted without such benefits being granted; and, therefore, Plaintiff filed his complaint in this honorable Court as hereinabove stated.

ARGUMENT AND AUTHORITY

Plaintiff's case is a meritorious one. The transcript of the proceedings relating to Plaintiff's claim for disability insurance benefits under Title 2 of the Social Security Act is absent of any indication that Plaintiff's disability was considered in light of the fact that he has the statutory requisites to meet the test set out in Title 20, Code of Federal Regulations, Section 404.1506(a) (1) and (2) and the Appendix thereto.

Plaintiff has an impairment which is of a level of severity

deemed by statute sufficient to preclude him from engaging in any gainful activity for a continuous period of more than twelve (12) months; and Plaintiff is, accordingly, entitled to Social Security benefits as a matter of law.

In a case such as this, if the trial court finds that there is substantial evidence to support the ruling of the administrative hearing examiner, the Court is to find in favor of the SECRETARY OF HEALTH, EDUCATION, AND WELFARE. In this case, however, the administrative transcript, filed herein and made a part of the record, is completely absent of any showing that there was ever a consideration based upon the statute and the facts applied to it as referenced above. The Social Security Administration failed to consider Plaintiff's disability in the light of the referenced statute; and, therefore, was not able to make a finding that Plaintiff has an impairment which is of a level of severity deemed by statute sufficient to preclude him from engaging in any gainful activity for a continuous period of more than twelve (12) months; which disability would automatically, under statute, entitle Plaintiff to disability benefits under the Social Security Act.

Plaintiff's claim in this cause is based upon the failure of the Administration's referee to consider the disability of Plaintiff in the light of Title 20, Code of Federal Regulations, Sections 404.1501(b)(i) and 404.1506(a)(1) and (2), read in conjunction with Subpart P. Appendix, Section 1.09. Plaintiff says that such failure is a conclusion of law and, as such, is entitled to review by the trial court. Section 404.1501(b)(i) states that "disability" means:

> Inability to engage in any substantial gainful activity because of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months;

Section 404.1506(a)(1) and (2) states with respect to the listing of impairments in the appendix:

> The Listing of Impairments describes, for each of the major body systems, impairments which—
>
> (1) Are of a level of severity deemed sufficient to preclude an individual from engaging in any gainful activity; and
>
> (2) Are expected to result in death or to last for a continuous period of not less than 12 months.

Subpart P, Appendix, Section 1.09 reads as follows:

> Amputation of; or anatomical deformity of (i.e., loss of major function due to degenerative changes associated with vascular or neurological deficits, traumatic loss of muscle mass or tendons and X-ray evidence of bony or fibrous ankylosis at an unfavorable angle, joint subluxation or instability).
>
> A. Both hands; or
>
> B. Both feet; or
>
> C. One hand and one foot.

Plaintiff would show that as a result of frostbite to both of his feet while in the Armed Services of the United States during the Korean Conflict, most of each foot was amputated. Plaintiff believes such amputation to comply with the statute as referenced above, and filed his claim with the Social Security Administration.

Although the reviewing authority of a District Court on appeal from a determination of the Social Security Administration is limited in that it may not substitute its own factual findings for those of the referees, where ultimate facts must be reached by a process of legal reasoning based upon the legal evidence to be afforded primary evidentiary facts, such aspect of administrative fact-finding has its law-making aspect, and is, therefore, reviewable. *Boyd vs. Forsom*, C.A.Pa. 1958, 257 F. 2d 778.

Where, as here, the controversy centers on conclusions to

be drawn from the facts, the District Judge is not even bound by the findings of the SECRETARY under the substantial evidence test. *Gluszek vs. Richardson,* D.C.Pa., 1972, 352 F. Sup. 1087. Indeed, the Court may even, "... order additional evidence to be taken before the Secretary..." 42 USC, Section 405(g). Plaintiff in this case is contending that the SECRETARY has made an improper conclusion of law and the Court is not, of course, bound to accept the SECRETARY's conclusion of law. *Reading vs. Richardson,* D.C.Mo., 1972, 339 F. Sup. 259; see also *Ridgeley vs. Secretary of Health, Education, and Welfare,* D.C.Md., 1972, 345 F. Sup. 983, affirmed 475 F. 2d 1222. It has long been Federal Law that the Court may act where the ultimate conclusion rests on improper interpretation of the law, *Spradlin vs. U.S.,* D.C.Mont., 1967, 262 F. Sup. 502, and the Court is not bound by the legal conclusions or conclusiveness of the findings of the administration. *Gray vs. Gardner,* D.C.S.C., 1966, 261 F. Sup. 736.

CONCLUSION

The referee of Defendant should have taken into consideration the referenced statute and appendix thereto and carefully considered the evidence in that light. If this had been done, Plaintiff is confident that the decision rendered would have been favorable to Plaintiff. Plaintiff has had an amputation of portions of both of his feet, which has left both of his feet with anatomical deformity, loss of function, vascular deficits, and loss of muscle mass and tendons that meet the terms of the statute. Pursuant to the provisions of Title 20, Code of Federal Regulations, Sections 404.1501(b)(i) and 404.1506(a)(1) and (2) and the referenced Appendix, Plaintiff has an impairment which is of a level of severity *deemed by statute sufficient* to preclude him from engaging in any gainful activity for a continuous period of more than twelve (12) months; and Plaintiff is, accordingly, entitled to Social Security benefits as a matter of law.

It is the position of the Defendant in this matter, as evidenced by its Motion for Summary Judgment recently heretofore filed herein, that the SECRETARY found Plaintiff was not under a disability and that such finding is supported by substantial evidence. The only "substantial evidence" in this regard, however, relates to a finding by the administrative law judge that Plaintiff was able to function in certain capacities; *but such finding is completely irrelevant* to the facts of this case. It is not material whether or not Plaintiff was able to function in any capacity where, as here, the statute and regulations clearly state that Plaintiff is entitled to disability benefits *as a matter of law.*

The only possible question remaining relates to whether or not Plaintiff has, with respect to both of his feet, an anatomical deformity, loss of function, vascular deficits, or loss of muscle mass that meets the terms of the referenced statute. In that regard, Plaintiff offers, for the consideration of the Court, photographs of his feet depicting their deformity, etc. at the time Plaintiff met the insured status. Such photographs have been previously filed herein as an attachment to Plaintiff's Motion for New Trial, and it is requested that the Court refer thereto. Even under a cursory examination thereof, it is evident that Plaintiff had a substantial loss of major portions of both of his feet at the time he met the insured status, and such fact is borne out by the transcript filed herein.

There can, therefore, be but one conclusion. Plaintiff believes that judgment should be rendered herein for benefits, past, present, and future, and attorney's fees as allowed by statute (Section 206, Social Security Act), pursuant to authority hereinabove cited; or, alternatively, that this case should

be remanded in order that additional evidence may be taken by the Administration.

Respectfully submitted,
TUCK R. CHAPIN, INC.

By: TUCK R. CHAPIN
126 Main Plaza
San Antonio, Texas 78205

LIST OF AUTHORITIES

(For the convenience of the Court, copies of all of the listed cases are attached hereto and made a part hereof.)

Boyd vs. Folsom
C.A. Pa., 1958, F. 2d 778

Gluszek vs. Richardson
D.C. Pa., 1972, 352 F. Sup. 1987

Reading vs. Richardson
D.C. Mo., 1972, 339 F. Sup. 259

Ridgeley vs. Secretary of Department of Health, Education and Welfare
D.C. Md., 1972, 345 F. Sup. 983; affirmed 475 F. 2d 1222

Spradlin vs. U. S.
D.C. Mont., 1967, 262 F. Sup. 502

Gray vs. Gardner
D.C. S.C., 1966, 261 F. Sup. 736

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

EDGAR H. MELIA, Plaintiff

VS. CIVIL NO. *SA-75-CA-259*

DAVID MATHEWS, Secretary of Health, Education, and Welfare, Defendant

STATE OF TEXAS
COUNTY OF BEXAR

AFFIDAVIT

BEFORE ME, the undersigned authority, on this day personally appeared EDGAR H. MELIA, who, after being duly sworn by me, stated under oath as follows:

My name is EDGAR H. MELIA. I am the Plaintiff in a cause now pending in Federal District Court for the Western District of Texas, San Antonio Division, styled, EDGAR H. MELIA vs. DAVID MATHEWS, SECRETARY OF HEALTH, EDUCATION, AND WELFARE, and numbered SA-75-CA-259. I am over the age of eighteen (18) years and have personal knowledge of the facts stated herein and am competent to testify concerning same.

I have, through all administrative remedies available to me, commenced and am still in the process of trying to obtain disability benefits from the Social Security Administration pertaining to injuries I sustained during the Korean Conflict, wherein I suffered severe frostbite and major portions of both my feet were surgically amputated. During my attempts to receive and collect Social Security benefits before I began the suit now pending in Federal District Court, I was

never advised by any agent of the Social Security Administration nor by any attorney or anyone else that such impairment, under statute, might entitle me to receive disability benefits under the Social Security Act.

The sole consideration during all such administrative proceedings was as to whether or not I could engage in certain types of activity, and my disability was never considered in the light of such statute, throughout all administrative proceedings, to my knowledge.

Until after said lawsuit was filed, I never knew that there was a statute that described certain types of disabilities such as I have, and prescribed these as statutorily presumptuous of disability and disability entitlements.

Further, Affiant sayeth naught.

EDGAR H. MELIA

SWORN TO and SUBSCRIBED before me this 10th day of February, 1977.

Notary Public in and for
Bexar County, Texas.

Supreme Court, U. S.
FILED
MAY 12 1978
MICHAEL RODAK, JR., CLERK

No. 77-1443

In the Supreme Court of the United States

OCTOBER TERM, 1977

EDGAR H. MELIA, PETITIONER

v.

JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

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EDGAR H. MELIA, PETITIONER

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JOSEPH A. CALIFANO, SECRETARY OF HEALTH, EDUCATION, AND WELFARE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The judgment of the court of appeals in this case was entered on December 21, 1977 (Pet. App.).[1] Petitioner did not seek rehearing in the court of appeals and did not obtain an extension of time within which to file a petition for certiorari. The time provided by 28 U.S.C. 2101(c) within which to file a petition for certiorari therefore expired on March 21, 1978. The petition was not filed until April 11, 1978. The time limit provided by Section 2101(c) is jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264. It is therefore repectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MAY 1978.

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[1]The judgment of the court of appeals was issued as mandate on January 12, 1978 (Pet. App. 8). The time within which to file a petition runs from the date of judgment, however, not from the date of the mandate.